LIBRARY
SUPREME COURT, U. S.

FILED
NOV 3 1962

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and regulations involved	2
Statement	3
Argument	9
Conclusion	17
Appendix	19

CITATIONS

Cases:

Arkansas Power & Light Co. v. *Federal Power Commission*, 185 F. 2d 751, affirming 8 F.P.C. 106, certiorari denied, 341 U.S. 909 — 13

California-Oregon Power Co. v. *Federal Power Commission*, 150 F. 2d 25, affirming 3 F.P.C. 368, certiorari denied, 326 U.S. 781 — 13, 16

Northwestern Electric Co., 2 F.P.C. 327 — 12

Northwestern Electric Co., 2 F.P.C. 369 — 6

Northwestern Electric Co., 3 F.P.C. 83 — 12

Northwestern Electric Co. v. *Federal Power Commission*, 321 U.S. 119 — 12, 13, 16

Pacific Power & Light Co. v. *Federal Power Commission*, 141 F. 2d 602, affirming 3 F.P.C. 329 — 13, 16

Speiser v. *Randall*, 357 U.S. 513 — 16

Statutes and regulations:

Administrative Procedure Act, June 11, 1946, c. 324, 60 Stat. 237, 5 U.S.C. 1001–1011, Section 2(c) — 12

Federal Power Act (Act of June 10, 1920, 41 Stat. 1063, 16 U.S.C. 791–823) as subsequently amended by the Public Utility Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 838, 16 U.S.C. 791a–825r):

Section 301, 16 U.S.C. 825 — 2, 8

Section 301(a), 16 U.S.C. 825(a) — 3, 10, 11, 12, 19

664445—62——1

Statutes and regulations—Continued Page

Federal Power Commission Uniform System of Accounts Prescribed for Public Utilities and Licensees, effective January 1, 1937 (revised to September 1, 1957) 3
General Instruction 2.F 13, 20
General Instruction 4 ..... 13, 20
General Instruction 5 ..... 13, 20
Account No. 538 ..... 5, 9, 13, 20
Account No. 787.2 ..... 3, 9, 21
Account No. 801 ..... 3, 9, 21

Miscellaneous:

NARUC, Bulletin No. 7, Interpretations of the Uniform System of Accounts of Electric, Gas and Water Utilities (Committee on Statistics and Accounts, Interpretation E-110) 5, 8

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 462

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion, findings and order of the Federal Power Commission (Pet. App. 50a–86a) issued August 17, 1960, and its order denying rehearing (Pet. App. 87a–90a) issued October 11, 1960, are reported at 24 F.P.C. 278 and 860, respectively. Its order of August 1, 1958, initiating the proceeding (Pet. App. 39a–49a, 75a–86a) is reported at 20 F.P.C. 108, and its order, issued July 15, 1959, on an interlocutory appeal from an exclusion of evidence by the examiner (R. 824–837) is reported at 22 F.P.C. 72. The opinion of the court of appeals (Pet. App. 6a–35a) is reported at 304 F. 2d 29.

JURISDICTION

The judgments of the court of appeals (Pet. App. 37a–38a) were entered on May 16, 1962. Petitions for rehearing filed on June 5, 1962, were denied on June 29, 1962 (Pet. App. 36a). The petition for a writ of certiorari was filed on September 26, 1962. The jurisdiction of this Court is properly invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 825*l*).

QUESTIONS PRESENTED

1. Whether the Commission acted in excess of its power in ordering, after notice and hearing, that advertising expenditures which it found were political in character be reclassified from operating expense accounts to a miscellaneous income deduction account.

2. Whether petitioners were denied their right to a fair hearing by the Commission's treatment of evidence offered to show that expenditures for advertising directed against government-supported power agencies were just and reasonable and non-political.

3. Whether the Commission's order requiring petitioners to reclassify political advertising expenditures to an income deduction account abridges their freedom of speech or constitutes a deprivation of property without due process of law.

STATUTE AND REGULATIONS INVOLVED

The pertinent portion of Section 301 of the Federal Power Act (49 Stat. 854, 16 U.S.C. 825) and excerpts from the Federal Power Commission's Uniform System of Accounts Prescribed for Public Util-

ities and Licensees are set forth in the Appendix, *infra*, pp. 19–22.

STATEMENT

Petitioners seek to set aside a Federal Power Commission order directing them to reclassify on their books of account certain expenditures for advertising which the Commission found were undertaken for political purposes. The reclassification transfers the expenditures from the companies' operating expense accounts, where they had first been entered, to a specified income deduction account.

On August 1, 1958, the Federal Power Commission issued an order (Pet. App. 39a–49a, 75a–86a) questioning the accounts to which 76 companies had assigned moneys expended for nine advertisements, part of the so-called "Electric Companies Advertising Program" (ECAP). The nine advertisements, reproduced in the Commission order initiating the case (Pet. App. 75a–83a), appeared from 1956 to 1958 in magazines of national circulation. The companies, which are "licensees" or "public utilities" under the Federal Power Act, had charged the questioned amounts to operating expense accounts, Account No. 7872 Demonstration, Advertising and Other Sales Expenses, or Account No. 801, Miscellaneous General Expenses.[1]

The order questioned the propriety of this accounting under Section 301(a) of the Federal Power Act

[1] These accounts are prescribed in the Federal Power Commission Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act (effective Jan. 1, 1937; revised to Sept. 1, 1957). See Appendix, *infra*, pp. 20–22.

(16 U.S.C. 825(a)) (Appendix, *infra*, p. 19), on the grounds that the expenditures "relate to the matter of private versus public ownership of electric facilities, a subject of political controversy, and the [advertisements are] of an argumentative character or nature in that controversy," and that expenditures involving the "presentation of argument in matters of political controversy" are not properly includible in those accounts but rather should be classified in Account No. 538, Miscellaneous Income Deductions (Pet. App. 39a–40a, 43a–44a). The order set a hearing at which each of the companies was directed to present "any justification there may be for its * * * respective accounting entry or entries herein questioned; and shall show cause, if any there be, why it should not by an appropriate memorandum accounting entry reclassify to Account 538, the respective dollar amount[s]" * * * (Pet. App. 48a).

At the hearing the companies offered evidence to show that, regardless of any political "connotations" of the advertisements, the expenditures were reasonable operating expenditures to meet competition. They also offered statements of opinion that the expenditures were not of a political nature.[2] The presiding examiner excluded the proffered testimony (R. 827, 290), but allowed it to be included in the record as an offer of proof (Pet. 4–5). The companies appealed the ruling to the Commission (R. 824).

[2] The opinions were those of two accountants (R. 185, 208–209), an economist (R. 264–265) and ten utility officials (R. 300–301, 359, 389–390, 399, 412–413, 445, 559–560, 608, 617, 636, 647–650).

The Commission sustained the exclusion of evidence going to the reasonableness of the expenditures on the ground that it was irrelevant because the only question raised was whether or not the expenditures were for political purposes (R. 828, 834; 22 F.P.C. at 75, 78). As to the opinion testimony claimed to be relevant to that issue, the exclusion was sustained because of its lack of sufficient weight (R. 831; 22 F.P.C. at 77).

After completion of the hearing and receipt of briefs, the Commission, holding that the advertisements in issue were political in nature, ordered the companies to reclassify (or transfer) their respective expenditures in connection with the ECAP program for eight of the nine advertisements, Nos. 2 through 9 (Pet. App. 76a–83a), from the operating expense accounts in which they had originally charged them to Account 538 (Pet. App. 70a–71a). In so ruling, the Commission cited Accounting Interpretation E–110 of the National Association of Railroad and Utilities Commissioners, issued November 27, 1945,[3] which em-

[3] National Association of Railroad and Utilities Commissioners, Interpretations of the Uniform System of Accounts of Electric, Gas and Water Utilities, Bulletin No. 7. Interpretation E–110 reads (R. 829):

Question: What is the proper account to be charged with non-promotional advertising of the type sometimes referred to as institutional advertising or as goodwill advertising, the purpose of which is to foster and maintain public goodwill rather than for any immediate and direct promotion of sales of electricity or appliances?

Answer: Such advertising should be charged to Account 787.2, Advertising; however, Account 538, Miscellaneous Income Deductions, should be charged with the cost of

bodies the principles enunciated in *Northwestern Electric Co.*, 2 F.P.C. 369. It summarized that interpretation as providing (Pet. App. 56a–57a):

> * * * in effect, that the cost of advertisements that are reasonably to be characterized as political in character should be classified to Account 538, Miscellaneous Income Deductions, in contrast to expenditures for other types of advertisements which are charged to operating expense accounts. Among the instances of political advertisements given in this interpretation are advertisements for the purpose of influencing public opinion as to the election of public officers, proposed legislation, repeal of existing laws, and influencing decisions of public officers. * * *

Considering the questioned ads as the best evidence, the Commission found that they were political in character within the terms of Interpretation E–110 (Pet. App. 57a). It reviewed specific aspects of the eight ads and concluded (Pet. App. 57a):

> * * * they deal with a political controversy, the private-public power dispute, and hence involve the presentation of argument in matters of political controversy. Considered more particularly, a scrutiny of the advertisements and a reading of their texts discloses that they have as a basic ultimate purpose the influencing of

---

any advertising for the purpose of influencing public opinion as to the election of public officers, referenda, proposed legislation, proposed ordinances, repeal of existing laws or ordinances, approval or revocation of franchises; for the purpose of influencing decision of public officers; or having any direct or indirect relationship to political matters.

> public opinion as to the repeal of existing law. Thus they have not just an indirect relationship to political matters, but are directly political. In addition, it is a fair inference that their ultimate purposes include the influencing of public opinion as to such matters as the election of public officers, proposed legislation, and influencing the decisions of public officers. And their purposes may also include the influencing of public opinion as to proposed ordinances, repeal of existing ordinances, and the approval or revocation of franchises.

The Commission rejected the companies' contention that it lacked authority to order an accounting reclassification based on the political character of the expenditures or to enforce such an accounting requirement, and found (Pet. App. 60a):

> Furthermore, the classification of these expenditures below the line as income deductions is necessary and appropriate for purposes of administering the Act and is reasonable thereunder. * * *

The Commission also specifically overruled the companies' objections to the examiner's exclusion of evidence proffered to establish the non-political character of the advertisements (Pet. App. 62a–63a). It found their "essentially political character * * * conclusively established by the advertisements themselves." "Assuming *arguendo*," it stated, "that respondents' proffered evidence shows that the expenditures have some other additional or subsidiary aspect or purpose * * * —this would not detract from their fundamentally political character, nor would it jus-

tify classifying them under our System of Accounts other than in the manner we find to be appropriate for political expenditures." The Commission then considered "with care" the opinion testimony that the advertisements were non-political (which had been included in full in the record as a proffer of proof) and concluded (Pet. App. 63a):

> * * * in view of the self-evident facts attested by the advertisements themselves, this evidence too, even when to it is added all the other evidence proffered by the respondents, is of insufficient weight to establish that the advertisements are in fact non-political in character.

Timely applications for rehearing were denied (Pet. App. 87a–90a).

On petitions for review, the Court of Appeals for the Fifth Circuit affirmed the order of the Commission, upholding it on each issue (Pet. App. 6a–35a). It pointed out, first, that Section 301 of the Federal Power Act, in authorizing the Commission to prescribe a system of accounts "as necessary or appropriate for purposes of administration of this Act," confers upon the Commission "a broad power to make administrative determinations of policy" (Pet. App. 15a). The court then concluded that the prescription of a separate accounting classification for political expenditures would aid in the administration of the Act. The court of appeals also held that the Commission, in determining the proper classification, was entitled to refer to Interpretation E–110; that the Commission's decision to put "political" expenses in

a separate category had a rational basis; that the exclusion of the proffered evidence was proper for the reasons cited by the Commission; and that there was no merit to the suggestion that the establishment of this accounting classification was a restriction upon free speech and a deprivation of property rights without due process of law.[4] Petitions for rehearing *en banc* were subsequently denied (Pet. App. 36a).

ARGUMENT

The question whether certain advertising expenses incurred by petitioners should be recorded in Account No. 538 of the Commission's Uniform System of Accounts, rather than Account Nos. 787.2 or 801, is plainly one committed to the discretion of the Commission, and the affirmance by the court below of the Commission's exercise of that discretion presents no problem warranting review by this Court. Nor do any of the subsidiary issues posed by the petition justify the grant of certiorari. Moreover, upon each of these issues, the holdings of the Commission and the court of appeals were correct and involve no conflict of decisions.

1. Section 301(a) of the Federal Power Act requires regulated companies to "keep * * * such accounts * * * as the Commission may by rules and regulations prescribe as necessary or appropriate for

[4] The court pointed out that the Commission had expressly stated that "these accounting classifications proceedings do not disturb any of the [petitioners'] property or other rights, which are subject to determination not here but in rate proceedings * * *" (Pet. App. 22a).

purposes of the administration of this Act * * *." It authorizes the Commission to "prescribe a system of accounts" to be kept by such companies and provides that "The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited." The Commission, having previously established a System of Accounts applicable to petitioners, initiated this proceeding under Section 301(a) to "determine by order the accounts in which particular outlays * * * shall be entered * * *," just as it had previously initiated scores of similar proceedings (see, for example, *infra*, pp. 11-12).

Petitioners argue that the Commission's admittedly broad authority under Section 301(a), control accounting by the public utilities subject to its regulations "as necessary or appropriate for purposes of the administration of this Act," is confined to prescribing or revising a "system of accounts," and that its accounting reclassification power under the same section is limited to application of the express provisions of the system it has previously prescribed. But nothing in the statute or the previous decisions of the Commission or the courts requires that the Commission prescribe such a detailed system of accounts in which each account expressly and particularly lists every expenditure to be classified therein. Rather, the Commission may reasonably choose to proceed, as it

did here, to prescribe a general definition of the accounts and then, by hearing and order, to reclassify expenditures which it determines come within the definition of a specific account.[5]

The holding below is plainly in accord with the leading decision on the Commission's accounting powers, *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119. There the Court had under consideration Commission accounting reclassification orders (reported at 2 FPC 327 and 3 FPC 83) requiring Northwestern Electric not merely to reclassify, but thereafter entirely to *eliminate* from its capital accounts $3,500,000, "by applying net income above preferred stock dividend requirements to its elimination" (321 U.S. at 121). Nothing expressly stated in the Commission's System of Accounts required that method of disposition. Thus, the case involved the very issue the present petitioners seek to raise, and the Court unanimously sustained the Commission's

[5] Petitioners suggest (Pet. 20–21) that the "necessary or appropriate" powers conferred in Section 301(a) apply only to rulemaking proceedings and not to adjudicatory proceedings; and that, while proceedings to prescribe or revise a system of accounts are rulemaking in nature, proceedings to reclassify expenditures are adjudicatory. But the reclassification proceeding is rulemaking. *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119; compare Section 2(c) of the Administrative Procedure Act, 5 U.S.C. 1001(c). And even if the Commission's order in this case should be viewed as an adjudication, there were, as the court below held, sufficiently definite standards established in the Commission's System of Accounts to warrant the reclassification ordered here (see *infra*, p. 12).

order as within the power conferred by Section 301 (a).*

The court below also properly rejected (Pet. App. 14a) petitioners' reading of the Commission's System of Accounts as providing for entering in Account 538 only operating expenditures in excess of just and reasonable amounts. While, as the court noted, the System's General Instruction 2F (upon which the petition relies, Pet. 15–16) does provide that all such excesses shall be placed in that account, the System does not provide that only such amounts shall be placed there. The account itself, broadly captioned "538. Miscellaneous Income Deductions," lists other "items" as properly enterable, and General Instruction 5 makes the listed "items" representative, not exhaustive (Appendix, *infra*, pp. 18–20). Further, the regulations contemplate the probability that new questions of proper classification of expenditures will arise from time, for General Instruction No. 4 provides for the submission of such questions to the Commission for consideration and decision (see Appendix, *infra*, p. 18).

---

* 321 U.S. at 122–123. The Court also rejected contentions, similar to those advanced here, that the order deprived the utilities of their constitutional right to due process. The breadth of the Commission's power with respect to reclassification of particular accounting entries is well established. *Pacific Power & Light Co.* v. *Federal Power Commission*, 141 F. 2d 602 (C.A. 9), affirming 3 FPC 329; *California-Oregon Power Co.* v. *Federal Power Commission*, 150 F. 2d 25 (C.A. 9), affirming 3 FPC 368, 676, 947, certiorari denied, 326 U.S. 781; *Arkansas Power & Light Co.* v. *Federal Power Commission*, 185 F. 2d 751 (C.A. D.C.), affirming 8 FPC 106, certiorari denied, 341 U.S. 909.

2. The examiner's evidentiary rulings, affirmed by the Commission and the court below, were correct. Petitioners' contention (Pet. 11–14) that they were denied a fair hearing by the examiner's exclusion of allegedly relevant and material evidence rests upon their narrow interpretation of the Commission's accounting powers and their restrictive reading of the scope of the income deduction account prescribed by the Commission as part of the Uniform System of Accounts, and should be rejected for the same reasons.[7] The examiner correctly excluded the testimony that the expenditures were reasonable and necessary—and not excessive—to meet the competition of government-supported power agencies. The income deduction account is not limited to expenditures in excess of just and reasonable amounts, and therefore, even if the proffered evidence established that the expenditures were just and reasonable, they would still be a proper charge to the income deduction account.

The opinion testimony designed to show that the expenditures were non-political was included in the record as a proffer of proof and carefully considered by the Commission (R. 828–834; Pet. App. 63a, 87a–90a). The Commission found it to be without sufficient weight to avoid the conclusion, based upon a review of the advertisements themselves, that the expenditures were for a political purpose.

[7] The same flaw underlies petitioners' arguments that the court below improperly refused to substitute its judgment for that of the Commission with respect to the accounting required by the System of Accounts (Pet. 14–17), and that the record was insufficient to support the findings and order of the Commission (Pet. 18–19). Both depend upon their narrow reading of Section 301(a) and the System of Accounts.

3. Petitioners' constitutional contentions (Pet. 22-29) are similarly without merit. The accounting order works no deprivation of due process or freedom of speech, and petitioners' attempt to impute to it such a substantive effect ignores this Court's refusal to treat accounting requirements as fixing rates.

Petitioners say that when an operating expense is disallowed for accounting it will stay disallowed for rate-making purposes as well (Pet. 28). However, rate making will follow the prescribed accounting only if, after that accounting has separated an item of expenditure from routine operating expenditures, the utility in a rate proceeding fails to justify allowance of that expenditure as an operating expense for rate-making purposes. If such disallowance in fixing rates is improper, as petitioners would argue, it is the rate order which will work the injury, not the accounting reclassification. Similar attempts to defeat Commission accounting requirements by imputing substantive effect to them have consistently been overruled. *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119; *Pacific Power & Light Co.* v. *Federal Power Commission*, 141 F. 2d 602 (C.A. 9); *California-Oregon Power Co.* v. *Federal Power Commission*, 150 F. 2d 25 (C.A. 9), certiorari denied, 326 U.S. 781.

The same vice underlies petitioners' contention, based upon *Speiser* v. *Randall*, 357 U.S. 513, that the accounting order imposes an unconstitutional discrimination which abridges their freedom of speech. In *Speiser*, the Court held that "a discriminatory

denial of a tax exemption for engaging in speech is a limitation on free speech" (*id.* at 518). Petitioners attempt to find a similar discrimination in that competing "government-supported power agencies" are allegedly not subject to corresponding accounting requirements for anti-private power ads. However, the *Speiser* decision rested upon the direct economic effect of the discriminatory denial. Since the accounting order in this case has no present economic consequences, it is apparent, without considering other distinctions, that no comparable issue is presented here.[8]

[8] It is difficult, in any event, to see how petitioners could complain if government-supported power agencies are not subjected to an accounting requirement which petitioners say would lower rates and thereby strengthen the competitive position of such agencies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

LEONARD D. EESLEY,
Special Assistant to the General Counsel,

DREXEL D. JOURNEY,
Attorney,
Federal Power Commission.

NOVEMBER 1962.

APPENDIX

Section 301(a) of the Federal Power Act, 49 Stat. 854, 16 U.S.C. 825(a), provides:

> SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

Excerpts from the Federal Power Commission, Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, Effective January 1, 1937 (Revised to September 1, 1957):

INSTRUCTIONS—GENERAL

* * * * *

2. *Records.*

* * * * *

F. All charges to the accounts prescribed in this system for electric plant, income, operating revenues, and operating expenses shall be just and reasonable, and any payments by the utility in excess of just and reasonable charges shall be included in Account 538, Miscellaneous Income Deductions.

* * * * *

4. *Submission of Questions.*

To maintain uniformity of accounting, utilities shall submit questions of doubtful interpretation to the Commission for consideration and decision.

5. *Items List, Interpretation of.*

Lists of "items" appearing in the texts of the accounts or elsewhere herein are for the purpose of more clearly indicating the application of the prescribed accounting. The lists are intended to be representative, but not exhaustive. The appearance of an item in a list warrants the inclusion of the item in the account mentioned only when the text of the account also indicates inclusion, inasmuch as the same item frequently appears in more than one list. The proper entry in each instance must be determined by the texts of the accounts.

* * * * *

INCOME ACCOUNTS

* * * * *

538. *Miscellaneous Income Deductions.*

This account shall include miscellaneous debits to income, not provided for elsewhere.

ITEMS

1. Decline in value of investments. (See Balance sheet instruction 4.)
2. Donations.
3. Expenditures for associated companies for which the utility will not be reimbursed.

* * * * *

OPERATING EXPENSE ACCOUNTS

* * * * *

787.2. *Advertising.*

This account shall include the cost of labor and materials used and expenses incurred in connection with advertising for the purpose of promoting the sales of electricity.

NOTE.—Do not include in this account advertising in connection with merchandise or appliance sales.

ITEMS

1. Advertising in newspapers, periodicals, etc.
2. Advertising manager and assistants.
3. Clerks.
4. Materials and expenses in preparing:
   - (*a*) Advertisements.
   - (*b*) Booklets.
   - (*c*) Bulletins.
   - (*d*) Dodgers.
   - (*e*) Posters.
5. Stenographers and typists.

801. *Miscellaneous General Expenses.*

This account shall include such items of expense applicable to the electric department as the cost of publishing and distributing annual reports to stockholders; advertising notice of

stockholders' meetings; dividend and other corporate and financial notices of a general character; association dues; contributions for conventions and meetings of the industry; cost of research and experimental work conducted for the benefit of the electric department or the industry or for the improvement of electric service (except such amounts as may be properly chargeable to other accounts); fees of transfer agents, registrars of stock, and fiscal agents; director's fees; and any other miscellaneous expenses connected with the general management and not otherwise provided for.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 16 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 462.

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

and

ARIZONA PUBLIC SERVICE COMPANY, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

A. J. G. PRIEST,
41 Old Farm Road, Bellair,
Charlottesville, Virginia

(See names of counsel at end of Reply Brief.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 462.

ALABAMA POWER COMPANY, *et al.*,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

and

ARIZONA PUBLIC SERVICE COMPANY, *et al.*,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Certain statements made and positions taken in the Commission's Brief in Opposition must be challenged:

1. That brief says that the holdings below "involve no conflict of decisions" (p. 9), but it mentions only *Speiser* v. *Randall*, 357 U. S. 513 (1958) and completely ignores (a) the decisions of this Court in *Morgan* v. *United States*, 304 U. S. 1 (1938), *NLRB* v. *Babcock & Wilcox*, 351 U. S. 105 (1956), *Universal Camera Corp.* v. *NLRB*, 340 U. S.

474 (1951), *Service* v. *Dulles*, 354 U. S. 363 (1957), *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959) and *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio* (No. 1), 294 U. S. 63 (1935), and (b) the decision of the Court of Appeals for the District of Columbia in *American President Lines* v. *Federal Maritime Board*, F. 2d (D. C. Cir. 1962), which are directly in conflict with the holdings below (Pet., pp. 9, 10, 11, 15, 16, 17, 18, 21, 23). Our reference to *American President Lines* should be amplified by saying that in that case the Court of Appeals for the District of Columbia held that the Maritime Board *could not* amend one of its existing rules (General Order 69) by an adjudicatory order, while in this proceeding the Court of Appeals for the Fifth Circuit *permitted* the Power Commission to amend its rules and regulations (System of Accounts) by an adjudicatory order. The two decisions are squarely in conflict.

2. The Commission's brief argues that the Commission has power "to prescribe a general definition of the accounts and then, by hearing and order, to reclassify expenditures which it determines come within the definition of a specific account" (p. 11). We have urged throughout this case that the Commission proceed on that premise. Instead, the Commission flagrantly disregarded its own prescribed definitions, which provide the legal standards applicable in this proceeding (Pet., pp. 15-16).

Nothing is more fundamental in the System of Accounts than the distinction it makes between operating expenses and income deductions. But the Commission's order that the questioned expenditures be charged as income deductions rather than operating expenses was not based upon the legal standards provided in the System of Accounts. The Commission apparently did not consider, and certainly

did not find, that the questioned expenditures were not incurred in the company's electric operations (Account 502, Operating Expenses), were not expenses of furnishing electric utility service (Operating Expense Accounts Instruction No. 1), were not advertising expenses (Operating Expense Account 787.2), were not miscellaneous general expenses (Operating Expense Account 801), were not *just and reasonable charges* (General Instruction 2F), or were within the express provisions of Account 538. The Commission, ignoring these standards, based its order solely on its conclusion that the expenditures dealt with "the private-public power dispute and *hence* involve the presentation of argument in matters of political controversy" (App., p. 57a; emphasis ours), a standard neither to be found in nor consistent with the System of Accounts. There certainly *can be* expenditures which relate to the private-public power dispute which meet the tests of the System of Accounts for operating expenses. The expenditures questioned in *this* proceeding related to the private-public power dispute and fully met those tests. They preserved and enhanced the companies' business and benefited their customers, as the evidence we proffered, but which the Commission rejected, demonstrated beyond the possibility of challenge.

We do not urge, as the Commission's brief suggests (p. 10), that the System of Accounts must be so detailed as to list for each account "every expenditure to be classified therein"; we do submit that when the Commission orders the reclassification of expenditures it must proceed within the limits of its stated powers. It disregarded these limits and came squarely in conflict with decisions of this Court (Pet., pp. 14-17).

In *Northwestern Electric Co.* v. *FPC*, 321 U. S. 119 (1944), upon which the Commission's brief places great reliance, the account involved, Account 107, explicitly pro-

vided that "the amounts included in this account . . . shall be disposed of as the Commission may approve or direct". In *Northwestern*, the Commission had ordered the disposition of a "writeup" pursuant to this provision and offered expert evidence to support its disposition. This Court pointed out that it was not for it to determine what was the better accounting practice "*so long as the Commission has not plainly adopted an obviously arbitrary plan*" (321 U. S. at p. 124; emphasis ours). In that case the Commission's action was a determination "within the definition of a specific account", not in disregard of all such definitions, as in this proceeding.[1] None of the accounts involved in this case gives the Commission power to dispose of an expenditure as the Commission may approve or direct. In this case the Commission offered no expert evidence to support the accounting it ordered, but adopted a plan so at odds with its System of Accounts and with the record as to be arbitrary, capricious and whimsical.

3. The Commission's brief (p. 10) questions our reading of Section 301(a) and of the System of Accounts. We have dealt with this problem (Pet., pp. 19, 20), but we may add that our argument is made best by the very language of 301(a) and of the applicable provisions of the System. The distortion of that language by the court below was plainly erroneous.

4. The Commission's brief says (p. 13) that the evidentiary rulings made by the trial examiner (excluding, as irrelevant and immaterial, the evidence offered by what the court below (App., pp. 11a-12a) called "an impressive list of business executives, accountants and auditors, deans and professors of schools of business administration, public

[1] Other decisions cited at page 12 of the Commission's brief are equally inapposite.

utility financial advisors and security analysts, and presidents of electric power companies") and affirmed by the Commission and the court below, were correct.

But the justification of the accounting entries, their "propriety" under the System of Accounts, and the relationship of the questioned expenditures to the cost of furnishing electric utility service patently *were in issue* in this proceeding (Pet., pp. 12-14). The companies' proffered evidence was admittedly competent and was relevant and material to such issues even under strict rules of evidence. Could it be rationally declared that this evidence did not *shed any light upon or touch the issues*?[2] The Commission's total exclusion of the companies' evidence cannot be justified constitutionally (Pet., pp. 11-14).

The Commission's brief does not even discuss the proffered evidence as it related to the issues on which it was offered. That evidence *justified* the questioned expenditures by showing that they were *operating expenses* under the provisions of the System of Accounts (pp. 2-3, *supra*). Nor is any attempt made to condone the Commission's exclusion, in this accounting proceeding, of the testimony of outstanding accounting experts that the questioned expenditures were properly charged as operating expenses under the provisions of the Commission's System of Accounts and under general accounting principles. There has been *no* reference to the rules of evidence in any document filed by or on behalf of the Commission.

5. The Commission's brief (pp. 14-15) seeks to justify the Commission's abridgment of free speech and deprivation of property without due process of law solely on the ground that the Commission's order allegedly has no "substantive effect". Is it contended that the protection of

---

[2] 20 Am. Jur., Evidence, §247. See Wigmore, *Evidence*, Third Ed. §29.

First Amendment rights depends upon dollar damage!, *Cf. N. A. A. C. P. v. Alabama*, 357 U. S. 449 (1958). And there is no reference in the Commission's brief to the conclusion of the Court of Appeals that the Commission's order has a serious impact on the companies (App., pp. 23a-24a) or to the Commission's report to the House of Representatives in which the Commission clearly imparted substantive effect to its accounting requirements (Pet., p. 28, n. 9).

6. Accounting Interpretation E-110 (Opp. Br., pp. 5-6, 8) was never promulgated as a rule or regulation of the Commission, never published in the Federal Register (R. 233-239), never formally approved by the Commission. The Commission, thus, not only deprived the companies of a fair hearing in this proceeding (Pet., pp. 11-14), but also applied against them a rule they never had a chance to contest in a rule-making hearing.

E-110 was repudiated in 1958 by the National Association of Railroad and Utility Commissioners (NARUC) which had issued it (R. 435) and has been repudiated by the Commission itself. The Commission's revised System of Accounts now in effect contains Account 930, Miscellaneous General Expenses, which provides for "Institutional or good will advertising" as an operating expense. The following note (in effect, Accounting Interpretation E-110) proposed, in 1958, for inclusion in the NARUC system which became the Commission's present System of Accounts is significantly absent from that System:

> "Note.—The cost of any advertising for the purpose of influencing public opinion as to the election of public officers, referenda, proposed legislation, proposed ordinances, repeal of existing laws or

> ordinances, approval or revocation of franchises, or for the purpose of influencing the public or its elected officials, in respect to political matters shall not be included herein but charged to account 426, Other Income Deductions." (R. 435)

If the Commission had attached genuine consequence to E-110, it would have included that discarded note in the present System of Accounts.

7. The Commission's brief (pp. 6-7) repeats that agency's groundless inferences that the questioned advertisements involve the influencing of public opinion as to "repeal of existing law", "election of public officers", "proposed legislation", "influencing the decisions of public officers", "proposed ordinances", "repeal of existing ordinances", and "the approval or revocation of franchises". These inferences are directly contrary to the companies' proffered evidence and are thoroughly specious. There is no reference in the questioned advertisements to any such "repeal", "election", "legislation", "decisions", "ordinances" or "franchises". The theme of the advertisements is that there is a substantially greater tax burden on the customers of investor-owned electric utilities than there is on the customers of government electric utilities. Their obvious implication is that the rates of investor-owned utilities are higher than those of government utilities as a result of this tax differential (see Pet., p. 6).

For the reasons stated in the petition and in this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A. J. G. Priest
41 Old Farm Road, Bellair
Charlottesville, Virginia

and

Reid & Priest
By Peyton G. Bowman III
Barr Building
910 17th Street, N. W.
Washington 6, D. C.
Attorneys for All the Petitioning Companies

Alvin W. Vogtle, Jr., *Esq.*
Joseph M. Farley, *Esq.*
Martin, Vogtle, Balch & Bingham
600 North 18th Street
Birmingham, Alabama

and

Hayden N. Smith, *Esq.*
Edwin J. Wesely, *Esq.*
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, New York
For Alabama Power Company

Frank Snell, *Esq.*
Snell & Wilmer
400 Security Building
Phoenix, Arizona
For Arizona Public Service Company

Daniel James, *Esq.*
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, New York
For Arkansas Power & Light Company

JOHN W. KELLY, *Treasurer*
Blackstone Valley Gas & Electric Company
55 High Street
Pawtucket, Rhode Island
For Blackstone Valley Gas & Electric Company

JOSEPH P. TYRRELL, *Esq.*
Boston Edison Company
182 Tremont Street
Boston, Massachusetts
For Boston Edison Company

SHEARON HARRIS, *Esq.*
Carolina Power & Light Company
Raleigh, North Carolina
For Carolina Power & Light Company

A. T. GARDNER, *Vice President and Secretary*
Delaware Power & Light Company
600 Market Street
Wilmington, Delaware

and

JOSEPH H. GEOGHEGAN, *Esq.*
Berl, Potter & Anderson
948 Delaware Trust Building
Wilmington, Delaware
For Delaware Power & Light Company

HENRY G. WASSON, JR., *Esq.*
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pennsylvania
For Duquesne Light Company

RICHARD K. MCPHERSON, *Esq.*
First National Bank Building
Joplin, Missouri
For Empire District Electric Company

WILLIAM H. SCHRODER, *Esq.*
TENCH C. COXE, *Esq.*
Troutman, Sams, Schroder & Lockerman
1607 William-Oliver Building
Atlanta, Georgia

and

HAYDEN N. SMITH, *Esq.*
EDWIN J. WESELY, *Esq.*
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, New York
For Georgia Power Company

BERT LANE, *Esq.*
Yonge, Beggs & Lane
Brent Annex
Pensacola, Florida

and

HAYDEN N. SMITH, *Esq.*
EDWIN J. WESELY, *Esq.*
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, New York
For Gulf Power Company

MAJOR T. BELL, *Esq.*
Orgain, Bell & Tucker
First Federal Savings Building
Beaumont, Texas
For Gulf States Utilities Company

C. DUANE BLINN, *Esq.*
Day, Berry & Howard
750 Main Street
Hartford, Connecticut
For Hartford Electric Light Company

ROBERT E. BARRETT, JR., *President*
Holyoke Water Power Company
1 Canal Street
Holyoke, Massachusetts
For Holyoke Water Power Company

STANLEY GARRITY, *Esq.*
Kansas Gas and Electric Building
201 North Market Street
Wichita, Kansas
For Kansas Gas and Electric Company

ANDREW P. CARTER, *Esq.*
Monroe & Lemann
1424 Whitney Building
New Orleans, Louisiana

and

DANIEL JAMES, *Esq.*
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, New York
For Louisiana Power & Light Company

CLAY C. BOSWELL, *Chairman*
C. H. SEIFF, *Vice President*
Minnesota Power & Light Company
30 W. Superior Street
Duluth, Minnesota
For Minnesota Power & Light Company

JAMES S. EATON, *Esq.*
Eaton, Cottrell & Galloway
Hatten Building
Gulfport, Mississippi

and

HAYDEN N. SMITH, *Esq.*
EDWIN J. WESELY, *Esq.*
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York 5, New York
For Mississippi Power Company

GARNER W. GREEN, *Esq.*
Green, Green & Cheney
Jackson, Mississippi

and

DANIEL JAMES, *Esq.*
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, New York
For Mississippi Power & Light Company

SAM B. CHASE, *Esq.*
The Montana Power Company
40 E. Broadway
Butte, Montana
For The Montana Power Company

FLOYD W. LEWIS, *Esq.*
317 Baronne Street
New Orleans 9, Louisiana

and

DANIEL JAMES, *Esq.*
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, New York
For New Orleans Public Service Inc.

BRADFORD S. MAGILL, *Esq.*
Naylon, Foster, Dean & Aronson
61 Broadway
New York 6, New York
For New York State Electric & Gas Corporation

DONALD E. NELSON, *Esq.*
A. R. RENQUIST, *Esq.*
15 South 5th Street
Minneapolis, Minnesota
For Northern States Power Company, a Minnesota corporation and Northern States Power Company, a Wisconsin corporation

JOHN R. WHITE, *Esq.*
47 North Main Street
Akron 8, Ohio
For Ohio Edison Company and Pennsylvania Power Company

RICHARD H. PETERSON, *Esq.*
MALCOLM MACKILLOP, *Esq.*
Pacific Gas and Electric Company
245 Market Street
San Francisco, California
For Pacific Gas and Electric Company

HUGH SMITH, *Esq.*
Smith, Gray, Hill & Rogers
1400 Public Service Building
Portland 4, Oregon
For Pacific Power & Light Company

AUSTIN GAVIN, *Esq.*
901 Hamilton Street
Allentown, Pennsylvania
For Pennsylvania Power & Light Company

VINCENT P. MCDEVITT, *Esq.*
EUGENE J. BRADLEY, *Esq.*
1000 Chestnut Street
Philadelphia, Pennsylvania
For Philadelphia Electric Company

CORNELIUS MEANS, *Esq.*
Potomac Electric Power Company
10th and E Streets, N. W.
Washington 4, D. C.
For Potomac Electric Power Company

PAUL G. JASPER, *Esq.*
Public Service Company of Indiana, Inc.
1000 East Main Street
Plainfield, Indiana
For Public Service Company of Indiana, Inc.

WENDELL W. BLACK, *Esq.*
Holman, Mickelwait, Marion, Black & Perkins
1900 Washington Blvd.
Seattle 1, Washington
For Puget Sound Power & Light Company

L. A. NICHOLS, *President*
Superior Water, Light & Power Company
1230 Tower Avenue
Superior, Wisconsin
For Superior Water, Light & Power Company

F. GERALD IRVINE, *Esq.*
Utah Power & Light Company
608 Kearns Building
Salt Lake City, Utah
For Utah Power & Light Company

JOHN W. RIELY, *Esq.*
Hunton, Williams, Gay, Powell & Gibson
1003 Electric Building
Richmond 12, Virginia
For Virginia Electric & Power Company

ALAN P. O'KELLY, *Esq.*
Paine, Lowe, Coffin, Herman & O'Kelly
602 Spokane & Eastern Building
Spokane 1, Washington
For The Washington Water Power Company

November 16, 1962